IN THE HIGH COURT OF UTTARANCHAL, NAINITAL.

No. 10 – COURT'S WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING.

[Chapter VIII, Rule 32 (2) (b)]

Criminal Jail Appeal No. 194/2004

Makhan Singh and another ..Appellants

Vs.

State of Uttaranchal Respondents.

Decided on 19-08-2006

A.F.R. (Approved for Reporting)
~~Not Approved for Reporting~~

(B.C. Kandpal, J.)

Dated: 19th August, 2006.

In the High Court of Uttaranchal, at Nainital.

Criminal Jail Appeal No. 194/2004

1- Makhan Singh,
2- Phumman Singh,
Both S/o Pahalwan Singh,
R/o Ujhani Duli, P.S. Bazpur,
District U.S. Nagar ...Appellants.

Versus

State of Uttaranchal ... Respondent.

Sri L.K. Tiwari, learned Amicus Curiae for the appellants.
Sri P.S. Soan, learned A.G.A. for the State.

Hon'ble B.C. Kandpal, J.

This jail appeal has been preferred by the appellants, against their conviction and sentence, recorded by Addl. Sessions Judge/ I F.T.C., Udham Singh Nagar vide judgment and order dated 31-5-2004, in S.T. No. 330/2003, whereby both the appellants were convicted U/S 376 I.P.C. and sentenced to ten years R.I. and fine of Rs. 5000/- each and in default of payment of fine to further undergo R.I. for one year. The accused/appellants were however acquitted from the charges U/Ss 323, 504, 506 I.P.C. levelled against them.

2- Brief facts giving rise to this appeal are that Jagtar Singh and his siter Shimali Kaur moved a written complaint, Ext. Ka.1 before the S.D.M. Ram Nagar, District Nainital with the allegations that accused Makhan Singh is the father of complainant Shimali Kaur and the accused Phumman Singh is her uncle. After

the death of her mother, both these accused had bad-eye on her for their lust. It was also alleged that the accused used to extract illicit liquor. After taking liquor they used to beat and ill-treat the complainant and her brother and sisters. It was also alleged that the accused persons committed forcible rape upon Shimali Kaur due to which she became pregnant. Jagga Singh, brother of the prosecutrix resides at the house of her maternal grandfather in village Tumadia Daam P.S. Ram Nagar due to the fear and cruelty committed on him by the accused persons. When he came to know about the offence committed by the accused persons, he came to Shimali Kaur to fetch her and his younger brother and sisters on 30-7-2003. The accused also beat him. The accused persons thereafter came at the house of maternal uncle and threatened to kill them. The S.D.M. Ramnager directed the S.O. to investigate the matter. The S.O. Ramnagar registered case against the accused persons vide entry in the G.D., Ext. Ka-6 S.I. N.P. Singh Chauhan investigated the case. He visited the spot and prepared site-plan Ext.Ka.7. Km. Shimali Kaur was got medically examined. On 13-10-2003 the prosecutrix was given in the Supurdagi of her maternal grandfather, and prepared memo of supurdagi, Ext. Ka.8. After completing the investigation, the I.O. submitted charge sheet, Ext. Ka.9 against the accused persons.

3- On committal of the case, the learned Sessions Judge framed charges U/Ss 376, 323, 504 and 506 I.P.C. The accused pleaded not guilty and claimed to be tried.

4- The prosecution in order to prove its case produced P.W.1, Km. Shimali the prosecutrix, P.W.2 Jagga Singh, brother of the prosecutrix, P.W.3, Dr. Nupur Sinha, P.W.4, Dr. Harish Lal, Radiologist, P.W.5 Mahendra Nath

Sharma and P.W.6, S.I. M.P.S. Chauhan, the I.O. of the case.

5- P.W.1, Km. Shimali is the prosecutrix of the case. She has stated on oath that her mother had died 5-6 years ago. She has deposed that she lived with her father the accused Makhan Singh and her uncle accused Phumman in village Bannakheda, Bajpur. Her brother Jagga used to live near Tumadia Daam. She has specifically deposed that her father and uncle, the accused persons, subjected her to forcible rape many times. She also deposed that her house is situate in an isolated place in the jungle and there is no neighbouring village.

6- P.W.2, Jagga Singh has deposed that his mother had died five years ago. The accused had turned out him from the house after beating him and he went at the house of his maternal grandfather and he is living there. He further deposed that his sister Shimali was living with the accused persons. When this witness went to his sister, then she told him about the offence of rape committed on her by his father and uncle the accused persons. This witness brought Km. Shimali to Ramnagar and there he got her medically examined by the doctor. He also deposed that he had given application at Ramnagar.

7- P.W.3 Dr. Nupur Sinha has medically examined Km. Shimali on 5.8.2003 in Govt. Hospital Ramnagar. According to this witness Km. Shimali was having six months pregnancy at the time of her examination. This witness has given advise for x-ray of the prosecutrix so as to ascertain her age. The witness has proved the medical examination report, Ext. Ka.2.

8- P.W.4, Dr. Harish Lal Radiologist has taken x-ray of the prosecutrix and prepared x-ray report, Ext. Ka.4. According to him the age of the prosecutrix was in between 16-18 years. He also deposed that there may be difference of two years on either side.

9- P.W.5, Mahendra Nath Sharma, S.I. has proved the G.D. copy Ext. Ka.5 and check report, Ext. Ka.6.

10- P.W.6 S.I. M.P. Singh is the I.O. of the case and has proved the prosecution papers prepared by him during the investigation.

11- The accused persons in their statements U/S 313 Cr.P.C. denied the prosecution allegation and stated that they have been falsely implicated in the case due to enmity. However, they did not adduce any evidence in defence.

12- The learned Sessions Judge, on hearing the learned counsel for the parties and perusing the record, held both the accused guilty for an offence U/S 376 I.P.C. and sentenced both of them to 10 years R.I. and a fine of Rs. 5000/- each and in default of payment of fine to further undergo R.I. for one year. However, the accused persons were acquitted of the charges U/S 323, 504 and 506 I.P.C.

13- Feeling aggrieved the accused/appellants have preferred this appeal.

14- I have heard learned counsel for the appellants, learned A.G.A. and perused the record.

15- The prosecution case rests on the evidence of Km. Shimali Kaur, who is the prosecutrix and P.W.2, Jagga Singh, who is the brother of the prosecutrix. The evidence of P.W.1, Km. Shimali Kaur reveals that she used to reside with her father Makhan Singh. She has also deposed that her real uncle Phumman Singh was also living with her father. She has also deposed that her mother expired 5-6 years ago and after the death of her mother, her father started committing cruelty with her brother Jagga Singh, who left the house and started living with his maternal grandfather in village Tumadia Daam. The prosecutrix resides in village Bannakheda. She has stated in her deposition that one year before from the date of lodging of the report, her father and her uncle Makhan Singh and Phumman Singh respectively used to commit rape upon her. Both the accused/appellants also threatened the prosecutrix with dire consequences. The house of the prosecutrix is situate in an isolated place in the jungle and there is no village nearby. The prosecutrix has also deposed in her statement that whenever she wanted to tell the incident to anyone, her father and uncle used to beat her and threaten her to kill. She has also deposed that her younger brother and sisters knew this fact, as they had also seen the accused/appellants committing rape upon her. The prosecutrix has also stated that when her brother Jagga came to her house from Tumadia Daam, then she narrated the incident to her brother and her brother could take her secretly to the house of maternal grandfather in the night, where she narrated the entire incident to her maternal grandmother, who took her to the Sub Divisional Magistrate, where report was written. She has also deposed that thereafter her medical examination was conducted in the hospital.

16- The Doctor P.W.3 Nupur Sinha conducted the medical examination of the prosecutrix and found that there was a pregnancy of about six months. The age of the prosecutrix was found to be between 16-18 years.

17- The deposition of prosecutrix finds corroboration from the medical evidence as the doctor found a pregnancy of about six months, therefore, the allegation with regard to the sexual assault upon the prosecutrix is established. The prosecutrix has further deposed that her father used to extract illicit liquor and also used to take it. She has also deposed that her real uncle accused Phumman Singh also used to take liquor. There is no reason as to why the prosecutrix will falsely implicate the accused/appellants leaving aside the actual culprit. There was no rhyme and reason as to why the daughter will depose falsely so as to expose her honour and dignity and also the whole, risking the out-casting or ostracisation and condemnation by the family circle as well as by the society. I do not find any ground to discard the testimony of the prosecutrix which finds complete corroboration with the medical evidence.

18- Further the evidence of P.W.2, Jagga Singh, who is the real brother of the prosecutrix, if taken into consideration, then the picture becomes quite clear. P.W.2, Jagga has deposed that accused Makhan Singh is his father and accused Phumman Singh is his real uncle. He has deposed that his mother expired about 5 years ago and after the death of the mother the accused/appellants compelled this witness to run away from the house, hence this witness went to the house of his maternal grandfather while the prosecutrix remained in the house of the accused/appellants. This witness has further deposed that when he went to see his sister then

Km. Shimali Kaur told him that the accused/appellants are subjecting her to rape and they also beat her. This witness has also deposed that in the night he took his sister silently to the house of his maternal grandfather (Nana) then Km. Shimali was taken to Ramnagar, where the report was lodged and Km. Shimali was medically examined.

19- It is, therefore, quite clear from the assessment of the evidence that accused/appellants took the benefit of this situation that Km. Shimali was living with them in the house and she was helpless. The house is situated at an isolated place in a jungle. Taking the benefit of this situation, the accused/appellants having misused the helplessness of a young girl, torned the pious relation of a daughter and father and real uncle. The act of the accused persons has refreshed the memories of uncivilized era.

20- The testimony of Km. Shimali itself is so consistent and definite about the sexual offence committed upon her that her testimony alone is sufficient to warrant the conviction. The Hon'ble Apex Court in **State of Punjab Versus Gurmeet Singh** reported in **(1996) 2 S.C.C. page 384** has held as follows:-

"Of late, crime against women in general and rape in particular is on the increase. It is an irony that while we are celebrating women's rights in all spheres, we show little or no concern for her honour. It is a sad reflection on the attitude of indifference of the society towards the violation of human dignity of the victims of sex crimes. We must remember that a rapist not only violates the victim's privacy and personal integrity, but inevitably causes serious psychological as well as physical harm in the process. Rape is not merely a physical assault. It is often destructive of the whole personality of the victim. A murderer destroys the physical body of his victim, a rapist

degrades the very soul of the helpless female. The Courts, therefore, shoulder a great responsibility while trying an accused on charges of rape. They must deal with such cases with utmost sensitivity. The courts should examine the brother probabilities of a case and not get swayed by minor contradictions or insignificant discrepancies in the statement of the prosecutrix, which are not of a fatal nature, to throw out an otherwise reliable prosecution case. If evidence of the prosecutrix inspires confidence, it must be relied upon without seeking corroboration of her statement immaterial particulars. If for some reason the court finds it difficult to place implicit reliance on her testimony, it may took for evidence which may lend assurance to her testimony, short of corroboration required in the case of an accomplice. The testimony of the prosecutrix must be appreciated in the background of the entire case and the trial court must be alive of its responsibility and be sensitive while dealing with cases involving sexual molestations."

21- The Hon'ble Apex Court in an another decision **State of Maharashtra Versus Chandraprakash Kewalchand Jain,** reported in **A.I.R. 1990 S.C. 658** has also summarized the position in the following words:-

"A prosecutrix of a sex offence cannot be put on a par with an accomplice. She is in fact a victim of the crime. The Evidence Act nowhere says that her evidence cannot be accepted unless it is corroborated in material particulars. She is undoubtedly a competent witness under Section 118 and her evidence must receive the same weight as is attached to an injured in cases of physical violence. The same degree of care and caution must attach in the evaluation of her evidence as in the case of an injured complainant or witness and no more. What is necessary is that the court must be alive to and

conscious of the fact that it is dealing with the evidence of a person who is interested in the outcome of the charge levelled by her. If the court keeps this in mind and feels satisfied that it can act on the evidence of the prosecutrix, there is no rule of law or practice incorporated in the Evidence Act, similar to illustration (b) Section 114 which requires it to look for corroboration. If, for some reason, the court is hesitant to place implicit reliance on the testimony of the prosecutrix it may look for evidence which may lend assurance to her testimony short of corroboration required in the case of an accomplice. The nature of evidence required to lend assurance to the testimony of the prosecutrix must necessary depend to the facts and circumstances of each case. But if a prosecutrix is an adult and of full understanding the court is entitled to base of conviction on her evidence unless the same is shown to be infirm and not trustworthy. If the totality of the circumstances appearing on the record of the case discussed that the prosecutrix does not have a strong motive to falsely involve the person charged, the court should ordinarily have no hesitation in accepting her evidence."

22- In view of the aforesaid situation it is quite clear that the prosecutrix in this case will not unnecessarily implicate her father and the real uncle in such a gruesome crime, leaving aside the actual culprit.

23- The next submission advanced by the learned counsel for the appellants in this regard is that Km. Shimali Kaur became pregnant on account of having illicit relation with her neighbours and she has, therefore, falsely implicated her father and real uncle in this crime.

24- I, myself, am not in agreement with the submission advanced by the learned counsel for the appellants. Km. Shimali a young girl, who is the victim of the lust of the accused/appellants of this type of heinous crime, which is an insult to the womanhood, will not stake her reputation by levelling a false charge concerning her chastity. The silence of the prosecutrix in the instant case for a continuous long period is quite clear from the facts and circumstances of the case that she was scared badly and on account of the sexual assault committed by the accused/appellants upon her, she had suffered a tremendous sense of shame and fear of being shunned by society and her near relatives. I do not find any reason as to why the evidence of the prosecutrix who has complained of rape upon her, be viewed with the aid of spectacles fitted with lenses tinged with doubt. The rape upon the prosecutrix in this case is serious blow to her supreme honour and offends herself esteem and dignity, it degrades and humiliates the victim who is a helpless innocent girl, it leaves behind a traumatic experience. This case thus needs to be dealth with sternly and severely.

25- On the basis of the assessment of the evidence on record, I come to the conclusion that the prosecution has successfully established the guilt of the accused/appellants beyond reasonable doubt. I do not find any ground for interference in the impugned judgment and order passed by the trial court convicting and sentencing the accused/appellants.

26- Learned counsel for the accused/appellants has submitted that some leniency should be extended in the sentence awarded to the accused/appellants. I find myself in utter disagreement with the submission

advanced in this regard. There is no extenuating or mitigating circumstance available on record which may justify imposition of any sentence less than the prescribed minimum to the accused/appellants and to show mercy in a case of such a heinous crime would be a travesty of justice and the plea of leniency is wholly misplaced.

27- The Hon'ble Supreme Court in a case of **State of Karnataka Vs. Krishnappa,** reported in **2000 Cri. L. J. (S.C.) page 1893** has observed that –

"The measure of punishment in a case of rape cannot depend upon the social status of the victim of the accused. It must depend upon the conduct of the accused, the state and age of the sexually assaulted female and the gravity of the criminal act. Crimes of violence upon women need to be severely dealt with socio-economic status, religion, race caste or creed of the accused or the victim are irrelevant considerations in sentencing policy. Protection of society and deterring the criminal is the avowed object of law and that is required to be achieved by imposing an appropriate sentence. The sentencing Courts are expected to consider all relevant facts and circumstances bearing on the question of sentence and proceed to impose a sentence commensurate with the gravity of the offence. Courts must hear the loud cry for justice by the society in cases of heinous crime of rape on innocent helpless girl of tender years, and respond by imposition of proper sentence. Public abhorrence of the crime needs reflection through imposition of appropriate sentence by the court."

28- In the instant case, the rapist is the father of the victim which qualifies for realm of sexual perversion and

in these class of cases, the offender deserves heavy and deterrent punishment.

29- Fore the foregoing reasons, in my view there is no merit in this appeal and the appeal is accordingly dismissed. The impugned judgment and order 31.5. 2004, passed by Addl. Sessions Judge/ I F.T.C., U.S. Nagar, in S.T. No. 330/2003 is confirmed.

30- The accused/appellants are already in jail. They shall be detained in jail to serve out the sentence imposed against them.

(B.C. Kandpal, J.)

Dated: 19-08-2006.

ISB